

TODTMAN, NACHAMIE, SPIZZ & JOHNS, P.C.
Attorneys for Defendants
425 Park Avenue
New York, New York 10022
(212) 754-9400
Scott S. Markowitz (SSM-0849)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MERRILL LYNCH BUSINESS FINANCIAL
SERVICES, INC.

Plaintiff,

Index No. 07 CV 9728 (NRB)

-against-

J.S. SUAREZ, INC., RAMONA SUAREZ,
MATTHEW SUAREZ, and "John Doe #1 "THROUGH
"JOHN DOE #12 the last twelve names being fictitious
and unknown to plaintiff, being persons having or claiming
interest in or lien upon the chattel described in the complaint

Defendant.
-----X

**DEFENDANT'S OPPOSITION TO PLAINTIFF'S
REQUEST FOR SIEZURE ORDER**

**TO: THE HONORABLE NAOMI R. BUCHWALD
UNITED STATES DISTRICT COURT JUDGE**

J.S. Suarez, Inc., by and through its attorneys, Todtman, Nachamie, Spizz &
Johns, P.C., respectfully submits the following in opposition to Merrill Lynch's motion for
an order of siezure.¹

INTRODUCTION

1. On or about June 14, 2004, Merrill Lynch through its small business unit
Merrill Lynch Business Financial Services, Inc. made a \$600,000.00 secured working

¹ Plaintiff also seeks to compel discovery to ascertain the whereabouts of its collateral. The
Defendants have no objection to this request.

capital loan to J.S. Suarez, Inc. ("JS"). Merrill Lynch aggressively solicited these types loans as they were able to obtain a brokerage client at the same.

2. JS was a family business with one retail store located at 450 Park Avenue, New York, New York. JS was engaged in the retail sale of handbags. Unfortunately, due to a significant decrease in business and increased rent,² JS ceased operations on October 1, 2007 and vacated its store premises. JS owes in excess of \$350,000.00 to its former landlord. JS also has significant trade debt.

3. In early 2007, at a time when JS's business was suffering, Merrill Lynch advised JS that it wanted out of the loan. JS was current on its interest payments but arguably was in technical default under the loan covenants.

4. By an agreement dated June 5, 2007, JS and Merrill Lynch agreed that the loan would be reduced gradually during June, July, August and September and that the loan would be fully paid by September 30, 2007. JS was not represented by counsel in connection with the loan modification agreement. Based upon past history, JS reasonably believed that Merrill Lynch would further extend the loan and afford JS a reasonable period of time to satisfy the loan.

5. JS made payments to Merrill Lynch but was unable to fully repay the loan by September 30, 2007. JS had certain securities on deposit with Merrill Lynch and Merrill Lynch liquidated the securities in October 2007, thereby reducing the loan to \$193,478.78. See **Exhibit "A"**.

6. In or about May 25, 2007, Matthew Suarez and Ramona Suarez formed a limited liability company by the name of Suarez New York, LLC. See **Exhibit "B"**.

² As of August 2007, JS' rent was approximately \$60,000.00 a month as its store was located on Park Avenue between 56th and 57th Street.

Suarez New York, LLC was capitalized by Gloria Suarez, Joseph Suarez and Ramona Suarez. Suarez New York, LLC obtained a lease for a store at 5 West 56th Street. Suarez New York, LLC purchased new inventory some with cash and some on credit and has been operating since October 2007.

7. Approximately \$200,000.00 at wholesale cost of inventory owned by JS was transferred to Suarez New York, LLC. The balance of Suarez New York LLC's inventory is new inventory which is not subject to Merrill Lynch's security interest.

**THE COURT SHOULD DENY MERRILL LYNCH'S REQUEST FOR
A SIEZURE ORDER AND HAS DISCRETION TO DO SO**

8. JS does not dispute that Merrill Lynch has a lien upon approximately \$200,000.00 of inventory which was transferred to Suarez New York, LLC. However, a portion of this inventory has been sold in the ordinary course of business. If the court grants a siezure order it will substantially disrupt Suarez New York, LLC's business during the busy holiday season.³ In addition, the siezure order can only be directed to the inventory which was transferred from JS to Suarez New York, LLC. Absent commencing an action against Suarez New York, LLC and demonstrating that Suarez New York is a successor to JS, the court cannot enter a siezure order against Suarez New York, LLC's assets. Suarez New York LLC is not a party to this action.

9. In its memorandum of law in support of the seizure order, Merrill Lynch cites Christie's Inc. v. Davis, 247 F.Supp 2d, 414, 419 (S.D.N.Y. 2001) which quotes from the Honeywell Information System, Inc. case for the proposition that the sole issue is which party has the "superior possessory right" to the chattels. This statement of law

³ Seizure would not result in an immediate satisfaction of the loan as the liquidation value of the handbags is substantially less than wholesale value.

is incomplete. As Judge Haight of this court explained in Airlines Reporting Corp. v. Omina Travel Service, Inc. 1986 WL 4900 (S.D.N.Y.), the revisions to the New York replevin statute made in 1979 provide that court with discretion to determine whether a moving party is entitled to an order of seizure on a provisional basis. Judge Haight pointed out that the traditional requirements for the issuance of preliminary injunctive relief including irreparable harm should govern provisional remedies.

10. Merrill Lynch's own financial problems have been well chronicled in the media. The Defendants understand that Merrill Lynch wants to obtain a quick repayment of the loan. However, it is unreasonable to expect a small business experiencing its own financial problems to be able to reduce a loan from \$600,000.00 to zero in six (6) months. The loan has been reduced to \$193,000.00.⁴

11. Given a reasonable period of time, JS and the guarantors fully intend to repay the loan. If the court grants a seizure order, Suarez New York, LLC will have no choice but to file a chapter 11 to prevent Merrill Lynch from interfering with its holiday business and/or taking collateral which it has no rights in. A chapter 11 filing is costly in comparison to the amount owed to Merrill Lynch and would likely result in a plan of reorganization providing for a payout of the loan. The balance of equities weigh in favor of denying the provisional relief sought by Merrill Lynch.

12. This court is a court of equity as is a bankruptcy court which is a unit of the district court. The district court has powers under the all writs act to grant or deny equitable relief. Here, it would not be equitable to grant a seizure order under the circumstances. The loan has been reduced from \$600,000.00 to approximately

⁴ Merrill Lynch claims it is owed \$226,451.14 as of October 29, 2007. However, its own statement indicates the balance is \$193,478.78.

\$200,000.00 in the last four (4) months. Given a reasonable period of time, the loan will be fully repaid.

WHEREFORE, it is respectfully requested that the court deny the request for seizure and grant such other relief as the court deems just and proper.

Dated: New York, New York
November 26, 2007

Todtman, Nachamie, Spizz & Johns, P.C.
Attorneys for Defendants

By: 

Scott S. Markowitz (SSM-0849)
425 Park Avenue
New York, New York 10022
(212) 754-9400

EXHIBIT "A"

RS. SUAREZ INC.
1450 PARK AVE
NEW YORK NY 10022-2605

Need Investment Guidance?
Call Your Financial Advisor

Your Financial Advisor:
VINCENT E YACKERY
1251 AVE OF AMERICAS, 24TH FL.
NEW YORK N.Y. 10020
Vince_Yackery@ml.com
(800) 999-1185

If you have questions on your statement,
call 24-Hour Assistance:
(866) 4MIBUSINESS
(866) 465-2874
Access Code: 91850-07236

Up-to-date account information can be viewed
at www.businesscenter.ml.com where your
statements are archived for three or more
years.

Primary Account: 850-07A36

YOUR MERRILL LYNCH REPORT

September 29, 2007 - October 31, 2007

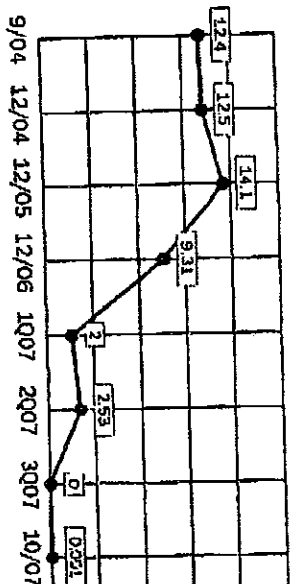
TOTAL MERRILL



PORTFOLIO SUMMARY

	October 31	September 28	Month Change
Net Portfolio Value			
Your assets			
Your liabilities			
Your Net Cash Flow (Inflows/Outflows)			
Securities You Transferred In/Out			
Subtotal Net Contributions			
Your Dividends/Interest Income			
Your Market Change			
Subtotal Investment Earnings			

Net Portfolio Value (in thousands), 2004-2007



TD: H/Att

4 pages

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NEW MERRILL LYNCH PRODUCTS PROTECT YOUR FINANCIAL SECURITY

Merrill Lynch now offers Preferred Identity Theft Restoration assistance and Credit Monitoring. Contact your Financial Advisor for details.

Online at: www.businesscenter.nml.com

Account Number: 850-07A36

J.S. SUAREZ INC.
450 PARK AVE
NEW YORK NY 10022-2605

24-Hour Assistance: (866) 4MLBUSINESS
Access Code: 91-850-07236

TOTAL MERRILL

Net Portfolio Value:

\$0.00

Your Financial Advisor:
VINCENT E YACKERY
1251 AVE OF AMERICAS, 24TH FL.
NEW YORK, N.Y. 10020
Vince_Yackery@nml.com
(800) 999-1185

WCMMA® ACCOUNT

September 29, 2007 - October 31, 2007

ASSETS

	October 31	September 28
Cash/Money Accounts	-	-
Fixed Income	-	-
Equities	-	-
Mutual Funds	-	-
Options	-	-
Other	-	-
Subtotal (Long Portfolio)	-	-
TOTAL ASSETS	-	-

CASH FLOW

	This Statement	Year to Date
Opening Cash/Money Accounts	-	-
CREDITS		
Funds Received	-	1,581,877.06
Electronic Transfers	333,656.03	480,955.72
Other Credits	333,656.03	2,062,832.78
Subtotal	-	(322,766.63)
DEBITS		
Electronic Transfers	-	-
Margin Interest Charged	-	-
Other Debits/WCMA Loan	(333,656.03)	(459,567.89)
Visa Purchases (debits)	-	-
ATM/Cash Advances	-	-
Checks Written/Bill Payment	-	(1,289,812.08)
Subtotal	(333,656.03)	(2,072,146.60)
Net Cash Flow	-	(\$9,313.82)
Dividends/Interest Income	-	-
Security Purchases/Debits	-	-
Security Sales/Credits	-	-
Closing Cash/Money Accounts	-	-
Securities You Transferred In/Out	-	-

J.S. SUAREZ INC.

Account Number: 850-07A36

24-Hour Assistance: (866) 4M BUSINESS
Access Code: 91850-07236

September 29, 2007 - October 31, 2007

YOUR WCMA TRANSACTIONS

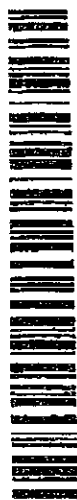
CASH/OTHER TRANSACTIONS					
Date	Transaction Type	Quantity	Description	Debit	Credit
10/01	WCMA Loan Int		COMMERCIAL LOAN INT	4,701.72	
10/01	Loan Advanced		WCMA LOAN ADVANCED		4,701.72
10/29	Loan Payment		WCMA LOAN PAYMENT	333,656.03	
10/29	Journal Entry		TR FROM 85022024		333,656.03
			AS OF 10/26/2007		
				338,357.75	338,357.75

Subtotal (Other Debits/Credits)

NET TOTAL

LOAN ACCOUNT ACTIVITY									
Effective Date	Description	Amount	Loan Balance	Interest From	Calculated To	Number of Days	Interest Rate*	Interest Accrued	
10/01	Opening Balance	4,701.72	522,433.09		10/02	1	10.52%	154.15	
10/01	Loan Advance		527,134.81	10/01	10/03	1	10.52%	154.05	
10/02	Loan Balance		527,134.81	10/02	10/04	1	10.52%	154.14	
10/03	Loan Balance		527,134.81	10/03	10/08	4	10.52%	616.45	
10/04	Loan Balance		527,134.81	10/04	10/09	1	10.52%	154.07	
10/08	Loan Balance		527,134.81	10/08	10/10	1	10.52%	154.04	
10/09	Loan Balance		527,134.81	10/09	10/11	1	10.51%	153.98	
10/10	Loan Balance		527,134.81	10/10	10/12	1	10.51%	153.90	
10/11	Loan Balance		527,134.81	10/11	10/15	3	10.49%	460.86	
10/12	Loan Balance		527,134.81	10/12	10/16	1	10.46%	153.16	
10/15	Loan Balance		527,134.81	10/15	10/17	1	10.44%	152.94	
10/16	Loan Balance		527,134.81	10/16	10/18	1	10.43%	152.80	
10/17	Loan Balance		527,134.81	10/17	10/19	1	10.42%	152.59	
10/18	Loan Balance		527,134.81	10/18	10/22	3	10.39%	456.74	
10/19	Loan Balance		527,134.81	10/19	10/23	1	10.35%	151.55	
10/22	Loan Balance		527,134.81	10/22	10/24	1	10.29%	150.71	
10/23	Loan Balance		527,134.81	10/23	10/25	1	10.27%	150.42	
10/24	Loan Balance		527,134.81	10/24	10/26	1	10.25%	150.18	
10/25	Loan Balance		527,134.81	10/25	10/29	3	10.21%	448.89	
10/26	Loan Balance		527,134.81	10/26					

Loan by Merrill Lynch Business Financial Services



0565 000636 000634

CS. SUAREZ INC.

Account Number: 850-07A36

TOTAL MERRILL

September 29, 2007 - October 31, 2007

YOUR WCMA TRANSACTIONS

LOAN ACCOUNT ACTIVITY (continued)									
Line of Credit .00 Limit		Loan by Merrill Lynch Business Financial Services							
Effective Date	Description	Amount	Balance	Interest From	Calculated To	Number of Days	Interest Rate*	Interest Accrued	
10/29	Loan Payment	333,656.03CR	193,478.78	10/29	10/30	1	10.19%	54.77	
10/30	Loan Balance		193,478.78	10/30	10/31	1	10.15%	54.57	
10/31	Loan Balance		193,478.78	10/31	11/01	1	10.11%	54.37	
10/31	Closing Balance		193,478.78						

The total interest due for the period 10/01/07 to 11/01/07 is 4,439.33 and will be charged to your WCMA Account on the first business day of November.

* Interest Rate: LONDON INTERBANK OFFERED RATE Plus 5.40% (see your loan documentation for further information).

WCMA Loan Interest Paid Year-to-Date 45,146.42

EXHIBIT "B"

NYS Department of State

Division of Corporations

Entity Information

Selected Entity Name: SUAREZ NEW YORK LLC

Selected Entity Status Information

Current Entity Name: SUAREZ NEW YORK LLC

Initial DOS Filing Date: MAY 25, 2007

County: NEW YORK

Jurisdiction: NEW YORK

Entity Type: DOMESTIC LIMITED LIABILITY COMPANY

Current Entity Status: ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

SUAREZ NEW YORK LLC
1 MAIDEN LANE, 5TH FLOOR
NEW YORK, NEW YORK, 10038

Registered Agent

SPIEGEL & UTRERA, P.A.P.C.
1 MAIDEN LANE, 5TH FLOOR
NEW YORK, NEW YORK, 10038

NOTE: New York State does not issue organizational identification numbers.

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